Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00553/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 23 May 2014	**On 25 June 2014**
Prepared 24 May 2014	

Before

UPPER TRIBUNAL JUDGE MCGEACHY

Between

DOGAN OZDEMIR

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, of Counsel instructed by Messrs Howe & Co, Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, a citizen of Turkey born on 10 June 1956 appealed against a decision of the Secretary of State made on 20 June 2013 to deport him to Turkey under the provisions of Section 3(5)(a) of the Immigration Act 1971. His appeal was allowed in the First-tier but that decision was set

aside by me after a hearing on 7 April 2014. My decision, which was given orally at the hearing, was that the appeal should proceed to a hearing afresh. In those circumstances the appeal came before me on 23 May.

2. My reasons for setting aside the decision of the First-tier Tribunal were as follows:-

> "1. This is an oral judgment in the appeal of the Secretary of State against a decision of the First-tier Tribunal (First-tier Tribunal Judge Callender Smith and non-legal member Mrs Hewitt) who in a determination promulgated on 15 January 2014 allowed the appeal of Mr Dogan Ozdemir against a decision of the Secretary of State made on 20 August 2013 to deport him to Turkey under the provisions of Section 5 of the 1971 Immigration Act.
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> 2. Although the Secretary of State is the appellant before me, I will for ease of reference refer to her as the respondent as she was the respondent in the First-tier. Similarly, I will refer to Mr Dogan Ozdemir as the appellant as he was the appellant in the First-tier Tribunal.
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> 3. The appellant arrived in Britain in September 1995 and claimed asylum. That claim was refused in 2001. Although he was granted four years' exceptional leave to remain thereafter, it appears that that leave to remain was granted in ignorance of the fact that the appellant had in January 1999 been sentenced to ten years' imprisonment following a conviction for conspiracy to supply Class A heroin.
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> 4. The appellant was released in 2003, having served part of his sentence and in 2005 applied for indefinite leave to remain. That was refused in 2007 and in November 2007 he was served with a notice of liability to deportation. He indicates that he may not have received that notice. It certainly was not appealed.
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> 5. Again, in August 2008 he was served with a notice of liability to removal to Turkey as an overstayer. Again, the appellant did not appeal.
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> 6. He remained therefore as an overstayer after June 2005 but did not leave the country. In January 2013 the notice of liability to deportation was served on him.
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> 7. The appellant's wife and four children were naturalised as British citizens in 2008.
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> 8. In the letter setting out the reasons for deportation, the Secretary of State correctly referred to the relevant structured approach set out by the Court of Appeal in their judgment in **MF (Nigeria) [2013] EWCA Civ 1192**. The Tribunal, in their determination, referred to the letter of refusal and noted that the appellant had been convicted of a serious offence and then considered the evidence given by the appellant and his wife and children at the appeal. They noted that the appellant is in ill health. He suffers from Type II diabetes and has physical mobility problems. In paragraph 34 of the determination, they said that the

presumption in favour of deportation in paragraph 396 of the Immigration Rules was outweighed for the reasons which they had given which included the fact that the appellant's wife and children were naturalised and in Britain, the appellant was in ill health and indeed that he had not been convicted of any crime since 2003. They also took into account the appellant's age.

9. The Tribunal gave what must be stated were extremely brief reasons for their decision. In paragraph 36 they wrote that:

> 'In finding that the appellant's Article 8 rights are so directly and proportionately engaged in respect of the current situation we find that the same factors -taken cumulatively - amount to sufficiently compelling reasons and exceptional reasons, under paragraph 399 why the respondent's decision disproportionately interferes with his Article 8 rights.'

The Tribunal stated that they had reached that conclusion having been mindful of the case of **MM v Secretary of State for the Home Department [2013] EWHC 1900**. They therefore allowed the appeal both under the Immigration Rules and on human rights grounds.

10. The Secretary of State appealed referring to case law such as the decision of the Court of Appeal in **DS (India) [2009] EWCA Civ 544** and **MF (Nigeria)**. In effect, the grounds assert that the Tribunal had not applied the appropriate structured approach to the issue of the deportation of the appellant and the consideration of his rights under Article 8 as set out in paragraphs 396 onwards of the Rules.

11. I gave permission on those grounds on 5 March 2014. At the hearing before me, Mr McVeety relied on the grounds of appeal.

12. Mr Harding in reply urged me to accept that the Tribunal had properly considered the exceptional circumstances in this case and in effect had reached conclusions that were open to them. He indicated that it might well be the case that when the Tribunal had referred to the judgment in the Administrative Court in **MM** they were in fact bearing in mind the judgment of the Court of Appeal in **MF**. He stated that the Tribunal had taken into account all relevant factors.

13. I find that there are material errors of law in the determination of the Tribunal. There is now in the Immigration Rules a properly structured approach to the issue of deportation. First, it is for the Tribunal to take into account the offence which has led to the decision to deport. In this case, the offence is very serious indeed. That was reflected in the conviction of the appellant and a sentence of ten years' imprisonment. It is of note that the Tribunal did not take into account the sentencing remarks of the judge.

14. The offence was serious and applying the Rules clearly it was one in which this appellant could not have succeeded under the Rules. The relevant factors that had then to be considered are those in paragraph 399, effectively the issue of whether or not there are exceptional factors that would mean that the appellant should not be deported,

factors which would mean that the Rules set out in paragraphs 398 and 399 should not be given effect.

15. The reality is of course that when the Rules refer to exceptionality, they are indicating that what is relevant is an exercise in the proportionality of removal but placing weight on the legislation on the Rules themselves, which had set out the relevant structured approach.

16. What is stated in **MF (Nigeria)** follows a considerable amount of case law which stressed the need for the courts to reflect the public interest in the deportation of criminals. If I consider the judgment of Lord Justice Rix in **DS (India) [2009] EWCA Civ 544**, I note the final sentence where he says:

> 'The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from a chance to re-offend in this country. It extends to preventing and deterring serious crime generally and to upholding public abhorrence of such offending.'

17. That comment is echoed in the Court of Appeal judgment in **SS (Nigeria) [2013] EWCA Civ 550** and indeed in the judgment in **MF (Nigeria)**. Although the Tribunal in this case make brief reference to the terms of Rule 396, there does not appear to be any weighing up by them of the serious nature of the appellant's offence. That, I consider, is a material error. There is the further material error that they state that they are guided by the judgment in **MM [2013] EWHC 1900. T**hat judgment relates to the levels of income required for spouses to meet the maintenance requirements of the Rules is not relevant, or certainly not central to the issues before the Tribunal. I consider that the Tribunal probably misunderstood the task before them when they considered that that judgment was one which would give them guidance in how to approach this appeal.

18. I would add that this is an extremely brief determination and the findings of the Tribunal are scant at best. However I consider that there are certain findings which can be preserved.

19. However, having found that there are material errors of law in the determination, I set aside the determination of the Tribunal and direct that the appeal be heard afresh. It shall remain in the Upper Tribunal.

20. The findings that can be preserved relate to the dates on which the appellant arrived in Britain and his own immigration history as set out in paragraphs 3 to 7 of the determination as it is also accepted the appellant's wife and four children were naturalised as British citizens.

21. I am concerned about two matters. The first is that of the confiscation order and what attempts were made to reclaim the money obtained by the appellant from his criminal activities. Secondly, I am concerned to know about what happened when the decisions were made in 2007, when the appellant was served with a notice of liability to deportation, and that made in August 2008 when he was served with a notice of liability to removal.

22. For the above reasons, as I say, I have set aside the decision of the First-tier Tribunal and the appeal will proceed to a hearing afresh."

3. It will be noted that in paragraphs 3 through 6 of my decision I set out the chronology of the appellant's immigration history and his offence for which he was sentenced to ten years' imprisonment in January 1999.

4. At the hearing before me the appellant, his wife and his four children gave evidence, the appellant and his wife giving their evidence through an interpreter.

5. Each relied on a statement or statements prepared before the hearing.

6. The appellant's statement referred to the fact that he had fled from Turkey with his wife and four children in 1995 and the fact that all his other members of his family are British citizens. He said that he had no-one in Turkey. He referred to his medical problems and said that he was a simple man. He expressed remorse and shame for the crime which he had committed.

7. In his most recent statement he referred to the confiscation order which had been made at the trial and said that he knew nothing about that.

8. He emphasised that he had received "emergency treatment" with regards to a suspected heart attack when his arteries were unblocked. He had been in hospital between 2 and 4 March 2014.

9. In his oral submissions he expressed remorse for the crime and said that in fact he had not had anything to do with the offence but had merely kept a bag which had been given to him for safekeeping. He accepted fully that he did commit the crime. He had not known that the bag contained heroin. He said that he had had nothing to do with drugs and had no friends who were involved with drugs.

10. He said that he had two sisters in Turkey, one older than he and the other younger. They were both ill and he did not know where they were but he had learnt of their medical conditions through cousins who had travelled to Turkey. He said there would be no-one to look after him if he returned to Turkey.

11. Mr Wilding put to him that 12 kilos of heroin had been found in the bag and he accepted that that was the case.

12. The appellant's wife gave evidence saying how difficult it had been for her and the children when the appellant had been sent to prison. That had caused her to be extremely depressed and she felt the children had missed out during their teenage years. However, the family had bonded thereafter. She stated that although her children were older they still

required a father figure. She said there was no-one to look after the appellant in Turkey and he had nowhere to return to there.

13. In her oral evidence it became clear that although she and the children lived at one address, the appellant had a separate flat, although it was her evidence that the appellant would come to the family flat during the day and then return to his own flat at night. She said this was because he had not wanted to disturb the children because of his own disturbed sleeping patterns. She emphasised that she was concerned for the children should the appellant be deported.

14. It was her evidence that her eldest daughter lived with a friend and was not in the family flat, although she did not know where that friend lived. She said that the two other daughters shared a room, her son had a bedroom and she had a bedroom. Apart from her husband, no-one lived in her husband's flat. She said that they were not divorced or separated. They would discuss the children's welfare together and other domestic matters. When asked if she still considered the appellant to be her husband she said that they had children.

15. The appellant's eldest daughter, Sevan, who is aged 29 gave evidence stating that she still lived in the family flat rather than with a friend, but she had lived with a friend when she was at university. She said that her father had moved out of the family flat because he would shout at night and said that she was always there for him. She would help take him to the doctor and support him. She did not know who would look after him in Turkey and described him as a man who had lost interest in life. She described her role as helping her father physically and emotionally.

16. The appellant's second daughter, Mehrican, who is aged 27 gave evidence. She again described herself as having a close relationship with her father and she would would help him go to medical appointments.

17. The appellant's son Ali who is aged 25 gave evidence. He stated that he was working part-time as he had not been able to get a full-time job since leaving university.

18. Finally, the appellant's fourth child, Yasmin, aged 23 gave evidence stating that her father was looked after by all members of the family. She herself is not yet working because she suffers from a skin complaint for which, at present, she is receiving laser treatment. That is likely to come to an end fairly soon, but in the meantime it means that, after each treatment (she has had five treatments out of eight) she has to remain in the flat.

Submissions.

19. In summing up Mr Wilding emphasised the public interest in the deportation of those who commit serious criminal offences and referred to the relevant structured approach set out in paragraphs 396 onwards of the

Rules. He argued that there were no exceptional circumstances in this case which would mean that the removal of the appellant would be disproportionate. While he accepted that the appellant had private and family life here he stated that that family life was not entirely straightforward given that the appellant had a separate flat from that of the other members of his family. He argued however that his relationship with the other members of the family did not cross the **Kugathas** threshold. Moreover, the appellant's health issues did not meet the test set out in the judgment of the Court of Appeal in **N (Kenya) [2004] EWCA Civ 1094.** The public interest in the deportation of a serious criminal was not outweighed because of the appellant's medical condition or other circumstances. It was not a case that it was unreasonably harsh for the appellant to be deported.

20. Mr Collins in reply referred to the appellant's age, the length of time he had lived in Britain and the appellant's medical evidence. He asked me to place weight on the fact that the appellant had only committed one offence and, in the light of the fact that there were no sentencing remarks from the judge to accept the assertions of the appellant that he had not known the contents of the bag which he had been asked to look after and that he had not known what was in the bag. He asked me to find that the appellant's account was unchallenged and that he had minimal involvement in the offence.

21. Turning to the living arrangements of the family he argued that this was a functioning nuclear family where the priorities of the family were the children and he asked me to find that the relationship between the appellant and his children was particularly strong – stronger than that of a relationship between most parents and their adult children.

22. He emphasised that the appellant had only committed one offence and had not committed any crime since release from prison over ten years ago.

23. Having referred to the determinations of the Tribunal in **MF (Article 8 – new Rules) Nigeria [2012] UKUT 00393 (IAC)** he asked me to find there were clearly exceptional features in this case given the fact that the appellant had been released from prison in 2003 and it was not until ten years later that the Secretary of State had taken steps to deport the appellant.

24. He emphasised that in the Court of Appeal judgment in **MF [2013] EWCA Civ 1192** it was emphasised that there were parallels between the system now in place under the Rules and the issue of whether or not removal would be a disproportionate interference with the Article 8 rights of the appellant under the Convention.

25. Moreover he referred to the determination of the Tribunal in **Izuazu (Article 8 – new Rules) [2013] UKUT 00045 (IAC)** where at

paragraphs 67 through 69 the Tribunal had referred to relevant Strasbourg jurisprudence and placed weight on the difficulties of the ease or otherwise of relocation and the best interests of the children and also factors such as whether or not he appellant had entered by fraud. He emphasised that the appellant had entered Britain lawfully in that he had been admitted and granted leave to remain. The appellant was not likely to reoffend. He also appeared to argue that, in effect, the factors set out in paragraph 399(b) of the rules were met.

26. He asked me to find that the removal of the appellant would be a disproportionate interference with his rights under Article 8 of the ECHR and in all the circumstances this was a case where it would not be appropriate for the appellant to be deported. While he stated the appellant was not arguing that his ill-health was such that his rights under Article 3 of the ECHR would be infringed his ill-health was a factor to be taken into account in the assessment of his Article 8 rights.

Discussion

27. The relevant structured approach to the consideration of the deportation of this appellant is that set out in Rules 398 and 399 of the Immigration Rules. It was accepted by Mr Collins that the appellant could not meet the provisions of the Rules as he had been sentenced for a period of more than four years and the appellant had not lived in Britain for at least fifteen years immediately preceding the immigration decision. However, what is relevant is the statement in paragraph 398(c) that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". In his judgment in **MF** the Master of the Rolls referred to paragraph 398 expressly contemplating the weighing of "other factors" against the public interest and the deportation of foreign criminals, but he went on to state in paragraph 42 that:-

> "Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation, something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals".

28. He went on to say that the word "exceptional" denotes a departure from a general Rule, the general Rule in the concept of deportation that in the case of a foreign prisoner to whom paragraph 399 and 399A do not apply, very compelling reasons would be required to outweigh the public interest in deportation.

29. In this case the appellant has been sentenced for a very serious offence, that of conspiring/supplying Class A heroin.

30. It is unfortunate that the judge's sentencing remarks are not in the papers, nor indeed was any pre-sentence report, however there is only one conclusion that can be drawn from the sentence of 10 years which is that this was considered to be a very serious crime indeed. I would add that not only was the appellant sentenced to ten years' imprisonment, but a confiscation order also, it appears, was made but that that was not acted upon. There is now before me an e-mail from the appellant's criminal solicitors stating that they could not recall the confiscation order or that anything had been done to enforce that and the respondent has no evidence regarding the order. The appellant states that he recalled nothing about the order. I will accept, for the present purposes, that the appellant was unaware of the order.

31. There are a number of other factors in this case which must be taken into account. It is relevant that since release from prison the appellant has not committed any other crimes and I note that in a letter dated 25 March 2013, Mr Rice, his Probation Officer, stated that it appeared that the appellant complied with all the terms of the licence and that he was not assessed as a high risk offender. I therefore conclude that there is little likelihood of the appellant reoffending or indeed of his having reoffended over the last ten years.

32. I now turn to the relationship between the appellant and other members of his family. From the evidence before me it appears that the appellant spends much of his time in the family home but returns to his own flat at night. This is despite the fact that according to his wife's evidence the family flat is not overcrowded – she has her own bedroom there. Indeed there does not appear any reason why the appellant's wife would not go with him to his flat at night. There is, however, I surmise a functioning relationship between the appellant and his wife and the children.

33. The reality is that the delay in making the decision to deport has meant that the appellant has been around during his children's teenage years and into their 20s. Although they appear to be a family where the children are only now, in their 20s, making tentative steps towards independent lives, that I am sure will develop in the near future. I do not consider that the children now need their father in close proximity to them.

34. It was clear from the evidence of the appellant's wife that she sees her primary role as that of looking after her children. They are, however, now at a stage when they do not need the daily help of their mother.

35. The further issue is whether or not the appellant requires the assistance of his children. Their evidence was that the appellant is not a well man and that they take him to medical appointments and on visits to the doctor. The principal reason for that is because the appellant does not speak English. It does not appear that either he or his wife are able to communicate outside the home, apart from contacts with their children and presumably some contacts within the Turkish community here and

the appellant clearly has contact with relatives here as he referred to cousins obtaining information about his sisters in Turkey. My conclusion is that neither the appellant nor his wife (who was unable to tell the court what her address was) are in any way integrated into this country.

36. The appellant's health is clearly of concern. There is a medical report from Dr Y K Seymenoglu of 10 July 2013 which refers to the appellant being a diabetic and his right arm being "almost completely out of use". The report says that he cannot shave without asking for help and that he had physically and mentally regressed in the past three years and was inclined to depression. He finds it difficult to express himself and needed family support. A further report from Dr Tim Fenn dated 19 July 2013 states that he had heard that the appellant no longer had any relations in Turkey who are able to support and care for him and that he expected his mental and physical health to deteriorate without the support of his family which would not be available to him in Turkey. That again referred to the appellant's depression and poor concentration. Dr Fenn stated that the appellant had gigantism of his right hand and had a hearing problem and he saw the diabetic nurse specialist regularly for a review of his Type 2 diabetes which was poorly controlled. He had problems expressing himself due to depression and language issues. There was a detailed list of medication which he was taking.

37. The appellant also produced a letter from Dr Fenn dated 19 May 2014 which said that the appellant had a heart attack on 2 March 2014 which had been treated with angioplasty. The heart attack was "on the background of Type 2 diabetes since 2004, hypertension since 2003 and bladder cancer in 2000. There is evidence that the appellant is having some follow-up treatment at University College London Hospital.

38. The Secretary of State, in the letter setting out the reasons for deportation dated 20 August 2013 deals with the appellant's medical condition under Article 3 of the ECHR. While it is not argued on behalf of the appellant that his rights under Article 3 would be infringed by his removal, the reality is that the letter of refusal does set out information regarding the medical treatment which the appellant could have in Turkey which includes free medication for hypertension and diabetes. There is detailed evidence relating to the Turkish Diabetes Foundation and there is information regarding home care services. There is also day care for disabled people and family consultancy services. There appears to be appropriate drugs available in Turkey.

39. It appears that the appellant does suffer from various medical conditions which are potentially disabling, but these do not appear to be life-threatening and can be treated in Turkey.

40. The appellant, I accept, receives considerable support from his family here. It would be certainly in his interest, if he were deported, for his wife to go with him. She would be able to provide the care which he requires.

I do not consider that he would need the assistance which he receives from his children in Turkey as I consider that that is largely because of his inability to integrate in Britain and the fact that he does not speak English.

41. The appellant's wife is British. Mr Collins referred to the concession made by the Presenting Officer in **Sanade and others** (British children – Zambrano- Dereci) India [2012] UKUT 48 (IAC) that a British woman should not be expected to leave Britain to go to a third country when her husband was deported. However, the facts in **Sanade** were that the British woman had a child who was being educated here. That is very different from the situation of the appellant's wife. Although I am sure that she considers her primary concern is to look after the children, the reality is that they are in their 20s and there seems no reason why they should not be able to look after themselves here should she decide to go to Turkey with her husband. That of course, would be a decision for her to make. Clearly there are some indications that the marriage is not as strong as it might be.

42. With regard to the appellant's relationship with his children there appears no reason why they would not be able to visit him in Turkey or that the family could keep in touch by telephone or even possibly Skype if that were set up by the children for the appellant in Turkey. I would add that I do not accept that the appellant has no ties with Turkey as he clearly has two sisters there with whom even if he, as claimed, is not in contact, other members of the family here are in touch with them.

43. I note that no asylum issues were raised in the appeal.

44. It is to be hoped that the delay by the Secretary of State in issuing deportation proceedings is exceptional. It has however enabled the appellant to be around while his children were being brought up, but they are now effectively independent. It does not appear that he has strengthened his own ties and developed his private life here in the interval.

45. The reality is that I do not consider that the appellant or indeed his wife are integrated into British society in any way other than through their immediate family. While I therefore take into account the appellant's health issues and the elements of private and family life which he has here against the very serious nature of the offence, I can only come to the conclusion that there is nothing disproportionate, let alone compelling that would mean that this appellant should be allowed to remain in this country.

46. I therefore, having set aside the decision of the First-tier Tribunal, remake the decision and dismiss this appeal on immigration and human rights grounds.

Signed Date

Upper Tribunal Judge McGeachy